

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:LAD:LA:TL-N-7532-98

KHAnkeny

date: October 20, 1999

to: Diana Ferrarin, Sr. Team Coordinator, CEG 1223

from: District Counsel, Los Angeles District, Los Angeles

subject: Consents to Extend the Period of Limitations for [REDACTED]
[REDACTED] and Its Subsidiaries and for [REDACTED]

DISCLOSURE STATEMENT

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ISSUES

You asked for our advice about the consents (the Consents) to extend the time to assess the tax due for the tax years ending January 1, [REDACTED] December 31, [REDACTED] and December 31, [REDACTED] in three circumstances:

- (1) [REDACTED]'s and its subsidiaries' income tax liability under Chapter 1 of the Code;
- (2) [REDACTED]'s and its subsidiaries' liability for withholding of income tax on nonresident aliens and foreign corporations under Chapter 3; and

(3) [REDACTED]'s income tax liability under Chapter 1.

In particular, you asked which entity should sign each Consent, who should sign on behalf of that entity, and which address should be used.

CONCLUSIONS

(1) With respect to its liability under Chapter 1 of the Code, [REDACTED] may sign the Consent as the agent for the affiliated group. The Consent may be signed by any duly authorized officer of [REDACTED]. It should list [REDACTED]'s current address.

To rule out the possibility that [REDACTED] should also sign a Consent, we recommend that you confirm that the number of shares of [REDACTED] stock outstanding on the date of the merger was greater than the [REDACTED] shares of [REDACTED] stock that the [REDACTED] shareholders and employees received as a result of the merger.

(2) With respect to its liability for the withholding of tax on nonresident aliens and foreign corporations under Chapter 3, [REDACTED] and its subsidiaries may sign one Consent. However, the Consent should follow the format provided in Revenue Procedure 72-38, and each corporation should authorize the signatory to sign the Consent. The Consent should list each corporation's current address.

(3) With respect to [REDACTED]'s liability under Chapter 1, [REDACTED] should sign a separate Consent. The Consent may be signed by any duly authorized officer of [REDACTED]. It should list [REDACTED]'s current address.

FACTS

[REDACTED] was a subsidiary of [REDACTED] which is a foreign sales corporation, was a subsidiary of [REDACTED]. On [REDACTED] [REDACTED] spun off [REDACTED] and all of its subsidiaries.

[REDACTED] filed consolidated income tax returns, Forms 1120, for the tax years ending January 1, [REDACTED] December 31, [REDACTED] and December 31, [REDACTED]. [REDACTED] filed separate income tax returns, Forms 1120, for those tax years. [REDACTED] and its subsidiaries also filed withholding tax returns, Forms 1042, for those tax years. The address listed on the returns was in [REDACTED].

On [REDACTED], [REDACTED] spun off one of its subsidiaries, [REDACTED]. [REDACTED] changed its address to [REDACTED].

On [REDACTED], [REDACTED] acquired [REDACTED]. [REDACTED] became a subsidiary of [REDACTED] and [REDACTED] remained a subsidiary of [REDACTED]. According to [REDACTED] to the Consolidated Financial Statements, [REDACTED] issued [REDACTED] shares of [REDACTED] stock to the [REDACTED] stockholders in exchange for their [REDACTED] stock. According to [REDACTED] to the Consolidated Financial Statements, [REDACTED] issued an additional [REDACTED] shares of [REDACTED] stock to the holders of [REDACTED] employee stock options. According to section [REDACTED] of the Agreement and Plan of Merger, there were [REDACTED] shares of [REDACTED] stock outstanding as of [REDACTED]. [REDACTED]'s current address is in [REDACTED].

DISCUSSION

(1) With respect to its liability under Chapter 1 of the Code, [REDACTED] should sign the Consent as the agent for the affiliated group. The Consent may be signed by any duly authorized officer of [REDACTED]. It should list [REDACTED]'s current address.

On [REDACTED], after [REDACTED] became a subsidiary of [REDACTED], [REDACTED] ceased to be the common parent. Once a corporation ceases to be a common parent, the following alternative agents have the authority to sign a Consent on behalf of an affiliated group:

(i) The common parent of the group for all or any part of the year to which the . . . waiver applies,

(ii) A successor to the former common parent in a transaction to which section 381(a) applies,

(iii) The agent designated by the group under § 1.1502-77(d), or

(iv) If the group remains in existence under § 1.1502-75(d) (2) or (3), the common parent of the group at the time the . . . waiver is given. Temp. Treas. Reg. § 1.1502-77T(a) (4).

Under section 1.1502-77T(a) (4) (i), [REDACTED] is an alternative agent and has the authority to sign the Consent on behalf of the group. Because [REDACTED] is still in existence, it is "[t]he common parent of the group for all or any part of the year to which the . . . waiver applies."

Section 1.1502-77T(a) (4) (ii) does not apply because [REDACTED], which still exists, has no successor.

Section 1.1502-77T(a) (4) (iii) does not apply because [REDACTED] is not about to terminate. Section 1.1502-77T(a) (4) (iii) refers to section 1.1502-77(d), which addresses a common parent that is about to terminate.

Section 1.1502-77T(a) (4) (iv) does not apply. First, section 1.1502-77T(a) (4) (iv) refers to section 1.1502-75(d) (2), which concerns whether a group remains in existence when a common parent no longer exists. Again, [REDACTED] still exists.

Next, section 1.1502-77T(a)(4)(iv) refers to section 1.1502-75(d)(3), which concerns reverse acquisitions. A reverse acquisition occurs when the shareholders of the acquired corporation receive more than 50% of the stock of the acquiring corporation:

(3) Reverse Acquisitions--(i) In general. If a corporation (hereinafter referred to as the "first corporation") or any member of a group of which the first corporation is the common parent acquires after October 1, 1965--

(a) Stock of another corporation (hereinafter referred to as the second corporation), and as a result the second corporation becomes (or would become but for the application of this subparagraph) a member of a group of which the first corporation is the common parent, . . .

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in exchange . . . for stock of the first corporation, and the stockholders (immediately before the acquisition) of the second corporation, as a result of owning stock of the second corporation, own (immediately after the acquisition) more than 50 percent of the fair market value of the outstanding stock of the first corporation, then . . . any group of which the second corporation was the common parent immediately before the acquisition shall be treated as remaining in existence (with the first corporation becoming the common parent of the group).

The merger was not a reverse acquisition because the [REDACTED] shareholders did not receive more than 50% of the [REDACTED] stock. In exchange for their [REDACTED] stock, the [REDACTED] shareholders received [REDACTED] shares of [REDACTED] stock. This is less than the [REDACTED] shares of [REDACTED] stock outstanding. Taking a more conservative approach, we include the [REDACTED] shares of [REDACTED] stock issued to [REDACTED] employees on their stock options as a result of the merger. The [REDACTED] shareholders and employees received [REDACTED] ([REDACTED] + [REDACTED] shares of [REDACTED] stock. This is still less than the [REDACTED] shares of [REDACTED] stock outstanding.

If section 1.1502-77T(a)(4)(iv) did apply and this were a reverse acquisition, then [REDACTED] would be an alternative agent and should also sign a Consent. In concluding that this was not a reverse acquisition, we assumed that the number of

shares of [REDACTED] stock outstanding on the date of the merger, [REDACTED] equaled the [REDACTED] shares outstanding on [REDACTED]. Thus, we calculated that the [REDACTED] shareholders and employees owned approximately [REDACTED] ($[REDACTED] / ([REDACTED] + [REDACTED])$) of the outstanding [REDACTED] stock. However, we recommend that you confirm that the number of shares of [REDACTED] stock outstanding on the date of the merger, [REDACTED] was greater than the [REDACTED] shares of [REDACTED] stock that the [REDACTED] shareholders and employees received.

In sum, the taxpayer may be identified on the Consent as:

[REDACTED] (EIN: [REDACTED] *

* With respect to the consolidated income tax liability of [REDACTED] (EIN: [REDACTED]) and Subsidiaries affiliated group for the short tax year ending January 1, [REDACTED] and for the tax years ending December 31, [REDACTED] and December 31, [REDACTED], [REDACTED] is an alternative agent under Temp. Treas. Reg. § 1.1502-77T(a)(4)(i).

You asked who may sign the Consent. The Consent may be signed by any duly authorized officer of [REDACTED] its president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other duly authorized officer. The regulations do not specify who may sign a Consent. However, documents generally should be signed according to the forms or regulations prescribed by the Secretary. I.R.C. § 6061(a). Therefore, the Service applies the rules for returns, which may be signed by the corporation's president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other duly authorized officer. I.R.C. § 6062; Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

You also asked whether the Consent should list [REDACTED]'s prior address in [REDACTED] because that was the address listed on the returns. The Consent should list [REDACTED]'s current address in [REDACTED]. If its address as stated on our records is not its current address, our records should be updated. Listing its current address would not invalidate the Consent. Section 6501(c)(4) does not require that a Consent list the address provided in the records of the Service. In contrast for example, section 6212(b)(1) does require that we mail a notice of deficiency to a taxpayer's last known address. Then, if the taxpayer did not receive the notice of deficiency, it would nonetheless be valid.

(2) With respect to its liability for the withholding of tax on nonresident aliens and foreign corporations under Chapter 3, [REDACTED] and its subsidiaries may sign one Consent. However, the Consent should follow the format provided in Revenue Procedure 72-38, and each corporation should authorize the signatory to sign the Consent. The Consent should list each corporation's current address.

If it would be more convenient for [REDACTED] and its subsidiaries to sign one Consent for their Chapter 3 liability, they may do so. As provided in Revenue Procedure 72-38, the Consent should identify the subsidiaries and contain an express agreement that the signatory is signing the Consent on behalf [REDACTED] and each of the subsidiaries:

1. The name of the parent corporation and the number of subsidiary corporations named on an attached rider shall be inserted in the space provided for the name of the taxpayer on the Form 872 The rider attached to the form will contain a supplemental agreement and will clearly identify the parent and the specific subsidiaries by showing the name, address, identification number, and the particular taxable year or periods See Exhibits A, B, and C for the format of the riders.

2. Both the consent and the rider shall be executed on behalf of the parent corporation and all the subsidiaries named in the rider by a duly authorized officer of the parent corporation who (1) is also a duly authorized officer of each of the subsidiaries, or (2) has been specifically authorized to execute a consent by powers of attorney executed by each of the subsidiaries. The consent must specifically show that the person signing for the parent and subsidiaries is signing in the capacity of an authorized officer of the parent corporation and as authorized officer or attorney-in-fact for each and all of the listed subsidiaries.

3. In the event two or more officers of the parent corporation are authorized to sign for the various subsidiaries, in accordance with 2 above, the rider attached to the consent should be arranged to show the names of the subsidiaries for which each officer or attorney-in-fact is signing. Rev. Proc. 72-38, 1972-2 C.B. 813, clarified, Rev. Proc. 82-6, 1982-1 C.B. 409; I.R.M. § 4541.3.

We have attached to this memorandum a copy of Revenue Procedure 72-38 and its exhibits. The exhibits help to explain the contents of the rider attached to the Form 872.

During our October 6, 1999 meeting, you expressed concern that if you identified each of the subsidiaries, you might omit a subsidiary. At that time, it was suggested that you could state in the Consent and the rider, "included, but not limited to, the following subsidiaries"

We recommend not adding the suggested language. Revenue Procedure 72-38 repeatedly stresses the importance of each corporation authorizing the signatory to sign that Consent. See also I.R.M. § 4541.3(3). Revenue Procedure 72-38 states that a Consent must "clearly identify . . . the specific subsidiaries." The signatory must be "a duly authorized officer of each of the subsidiaries, or . . . [be] specifically authorized . . . by each of the subsidiaries." The Consent "must specifically show that the person signing for the . . . subsidiaries is signing in the capacity of . . . an authorized officer or attorney-in-fact for each . . . of the listed subsidiaries." Finally, if "two or more officers of the parent corporation are authorized to sign for the various subsidiaries, . . . the rider . . . should . . . show the names of the subsidiaries for which each officer or attorney-in-fact is signing."

We are concerned that the suggested language, which is probably unenforceable, may appear heavy-handed. By adding the suggested language, we would attempt to bind unidentified subsidiaries based on unknown authorization. An unidentified subsidiary would only have to deny authorization to avoid being bound by the Consent. Congress has already expressed some concern with about the Consent procedures. For example, starting next year we are statutorily required to notify a taxpayer of his right to refuse or limit a Consent each time we request that he sign a Consent. I.R.C. § 6501(c)(4)(B).

As explained in paragraph 2 of Revenue Procedure 72-38, the Consent should be signed by a duly authorized [REDACTED] officer who either is also a duly authorized officer of each of the subsidiaries or has been specifically authorized to execute a Consent by the subsidiaries. It is possible that no officer of [REDACTED] is also an officer of its former subsidiary [REDACTED]. In that case, [REDACTED] may specifically authorize a [REDACTED] officer by power of attorney to sign the Consent. Amesbury Apartments, Ltd. v. Commissioner, 95 T.C. 227, 242 (1990) (an accountant was authorized to sign the Form 872-P under the power of attorney signed by the partnership's general partner).

In addition, we recommend that the "tax" on the Consent be identified as the "Withholding of Tax on Nonresident Aliens and Foreign Corporations under Chapter 3 of the Internal Revenue Code as reported on Form 1042."

Finally, the Consent should list the current address of [REDACTED] and each of the subsidiaries.

This Consent for the Chapter 3 liability of [REDACTED] and its subsidiaries should be separate from the Consent for their Chapter 1 liability. Otherwise, a single Consent covering "income" tax might be ambiguous about whether that Consent also covered Chapter 3 liability. I.R.M. § 4540.1(18). Also, [REDACTED] will sign the Consent for the Chapter 1 liability as an alternative agent under section 1.1502-77T(a)(4)(i). But, [REDACTED] is not an alternative agent for the purpose of Chapter 3 liability. Section 1.1502-77T(a) concerns only Chapter 1 liability. I.R.C. §§ 1501, 1502.

(3) With respect to [REDACTED]'s liability under Chapter 1, [REDACTED] should sign a separate Consent. The Consent may be signed by any duly authorized officer of [REDACTED]. It should list [REDACTED]'s current address.

[REDACTED] should sign a separate Consent for its liability under Chapter 1. I.R.C. § 6501(c)(4)(A). It will not be included in the Consent that [REDACTED] signs as the agent for each subsidiary in "the group." Temp. Treas. Reg. § 1.1502-77(a). As a foreign sales corporation, [REDACTED] is a foreign corporation. I.R.C. § 922(a)(1)(A). It is not a member of "the group" because a foreign corporation is not includible in an affiliated group. I.R.C. § 1504(b)(3).

[REDACTED]'s Consent may be signed by [REDACTED]'s president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other duly authorized officer. I.R.C. § 6062; Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. Finally, the Consent should list [REDACTED]'s current address.

Please call me at 213-894-3027, extension 155, if you have any questions.

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By: _____
KATHERINE H. ANKENY
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Attachment